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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 510

PHILIP STEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM IN REPLY TO OPPOSITION OF RESPONDENT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The opposition filed by the Respondent, United States of America, states that Petitioner's contentions are without merit, and briefly sets forth its statements which purportedly support that conclusion. In reading and studying the opposition filed by the Respondent it is apparent that

its statements are in error and this error is revealed by the record on file herein.

The Respondent's opposition (Page 4) states that there is no merit "* * * to Petitioner's contention that the indictment failed to allege that he had misrepresented the nature of the entries on the match book covers and thus that the jury was not permitted to acquit him even if it believed his defense." There is unquestionable merit in this contention of this Petitioner, and the merit is shown on the face of the indictment. It is without question that the indictment does not allege that the Petitioner misrepresented the nature of the entries on the matchbook covers. The Respondent takes the position before this Court that the use of the words, "false documents", as alleged in Count II was sufficient to carry the implication and innuendo of *misrepresentation* of the nature of the entries of the match book covers. Case upon case issued out of the Supreme Court of the United States, the various Courts of Appeal of the United States, as well as the Federal District Courts recite the law to be that an indictment (or a count therein) is not sufficient if based on *implication* or *innuendo*. *United States v. Apex Distributing Company, Inc.*, 148 F. Supp. 365 (D.R.I., 1957); *United States v. Minnec*, 104 F. 2d 575 (C.A. 7, 1939) cert. den. 308 U.S. 577; *McClintock v. United States*, 60 F. 2d 839 (C.A. 10, 1932); *Dunn v. United States*, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356.

It cannot be emphasized too much, and it is implored that the Court's attention be directed to the fact, that there is no case parallel or analogous to the case at bar which has

arisen under the statute in question, namely, 18 U.S.C. 1001. In that regard it is pointed out to this Honorable Court that this case is the first case presented for decision and determination of whether or not the government, in alleging a document is false, must allege the nature of its falseness unless the document is in itself false. In the case at bar the documents themselves are not attacked as being false. The falseness of the documents in question arise out of an alleged misrepresentation of the Petitioner at the time they were submitted into evidence before the Tax Court of the United States. It is this misrepresentation which is not alleged in the indictment, whereas the Constitution of the United States of America, Rule 7(c) of the Federal Rules of Criminal Procedure and all case law thereunder requires that every essential element of a crime be charged by the indictment. This essential element of this purported crime was not alleged in the indictment.

It is not to the advantage of the Respondent that no objection to the Court's charge was made by Petitioner. The Rules do not provide that such objection be necessarily taken to preserve error. It is to the advantage of the Petitioner that all proper motions were prepared and filed within the given times, briefs submitted in support thereof and proper error assigned at all points in the progress of this matter. The record is clear as to Petitioner's right to raise his objections as they have been raised herein.

In conclusion and summary Petitioner submits to the Court that the matter herein is a case of first impression for the Courts of the United States of America in that it involves a serious Constitutional question regarding the

rights of parties being charged under indictments brought for violations of 18 U.S.C. Section 1001 and that this case, being a substantial deviation of the Constitutional rights of Defendants charged by indictment which have heretofore been accorded to such individuals by reason of Amendment VI of the Constitution of the United States, Rule 7(c) of the Federal Rules of Criminal Procedure, and seventy-five years of case law arising out of the various Federal Courts, including this Honorable Supreme Court of the United States, is of extreme importance. For the foregoing reasons, and those set forth in the original Petition for Writ of Certiorari on file herein, Writ of Certiorari should be granted and Petitioner respectfully so prays.

Respectfully submitted,

HENRY KLEPAK,
ROY J. TRUE,

By .....

CERTIFICATE OF SERVICE

I hereby certify that I have delivered to the attorneys of record for the Respondent, Thurgood Marshall, Solicitor General, Mitchell Rogovin, Assistant Attorney General, Richard B. Buhrman and John M. Brant, attorneys, Department of Justice, Washington, D. C., and Melvin M. Diggs, United States Attorney, B. H. Timmins, Jr., Assistant United States Attorney, P. O. Box 153, U. S. Post Office and Courthouse, Dallas, Texas, a copy of this Memorandum in Reply to Opposition of Respondent on the ..... day of ....., 1966.

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